

**BEFORE THE
GOVERNING BOARD
LYNWOOD UNIFIED SCHOOL DISTRICT**

In the Matter of the Layoff of:

BRADLEY HAUSER,

Respondent.

OAH No. 2011040319

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 5, 2011, in Los Angeles.

Michael E. Wolfsohn, Leal & Trejo, APC, represented the Lynwood Unified School District (District).

Richard J. Schwab, Esq., Trygstad, Schwab & Trystad, represented Bradley Hauser (Respondent), who was also present.

The hearing concluded on May 5, 2011, but the record remained open for submission of closing briefs, which were timely received and marked as follows: the District's exhibit 11; Respondent's exhibit D. The record was closed and the matter submitted for decision upon receipt of the briefs.

The hearing of this matter was previously continued for 14 days at the request of counsel, as described in more detail in a written order previously issued. Pursuant to Education Code sections 44949, subdivision (c), and 44955, subdivision (c), the continuance extended the deadline for submission of the proposed decision to May 20, 2011.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Nancy Nichols Nolasco made and filed the Accusation in her official capacity as the District's Acting Director of Human Resources.

2. Respondent is a certificated District employee.

3. On February 22, 2011, the Governing Board of the District (Board) adopted Resolution No. 10-11/25 (Resolution), which proposed to reduce or discontinue various particular kinds of services by the close of the 2010-2011 school year.

4. On or about March 3, 2011, eight certificated District employees, including Respondent, were given preliminary notice that their services would not be required for the following school year, pursuant to Education Code sections 44949 and 44955.

5. For various reasons, Respondent was the only certificated employee of the aforementioned eight who timely requested a hearing and filed a Notice of Defense in response to the Accusation issued against him.

The Board's Resolution

6. The Resolution provided for the reduction or elimination of the following particular kinds of services:

<u>Particular Kinds of Services</u>	<u>Full Time Equivalent (FTE) Positions</u>
Art	2
Physical Education	4
English	6
History/Social Science	4
Multiple Subject	38
Elementary Counseling	5
	==
Total K-12 Certificated Positions	59 ¹

7. The decision to reduce or eliminate 59 K-12 FTEs was the result of financial uncertainty created by the current state budget crisis, anticipated cuts in state education funding for the next school year, and overstaffing experienced by the District.

8. Primarily through retirements and reallocation of funds which occurred after the Board adopted the Resolution, the District revised the number of positions it intended to reduce or eliminate from 59 FTE positions down to four FTE positions, those being one elementary counseling position and three single subject English teaching positions.

9. As a result of the aforementioned revision, the District agreed to rescind the proposed layoffs of 55 FTE positions subject to the Resolution, with the exception of one elementary counselor position and three single subject English positions. Of the certificated employees serving in the four positions the District proposes to reduce or eliminate, Respondent is the only one who requested a hearing.

¹ The Resolution also proposed to reduce or eliminate 34 FTEs positions for Adult Education Programs and 54 FTE positions of certificated management employees by the close of the 2010-2011 school year. Since there were no respondents relative to those positions, and no dispute regarding them arose in this matter, they will not be addressed.

10. In exhibit “A” to the Resolution, the Board determined that it was necessary to retain certificated employees for the following school year regardless of seniority (skipping) to teach a specific course or courses of study who possess the following types of special training and experience which others more senior do not possess:

A. No Child Left Behind (NCLB) compliant teachers over non-NCLB compliant teachers.

B. Certificated Personnel who possess a permanent clear authorization to teacher English Language learners, Cross-Cultural Language Development (CLAD); however, teachers who possess an emergency certification would not be skipped.

C. Certificated personnel who possess a credential authorizing service in Special Education, who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2011-2012 school year.

D. Certificated personnel who meet the criteria of A and B above, and have a Single Subject Credential authorizing service in a single subject area who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2011-2012 school year.

E. Certificated personnel who possess National Board Certification over teachers who do not possess National Board Certification.

11. The District established a need to retain certificated employees with an English Language learner authorization. Approximately 70 percent of the District’s students are English Language (EL) learners. In the past, the District has assigned EL students to classes taught by teachers without an EL authorization, which has subjected the District to sanctions and the risk of losing funding. The District is currently being monitored by county and state education authorities regarding its compliance with the laws regarding EL instruction. Thus, having certificated staff with EL authorization will help the District avoid further sanctions and will provide the District with flexibility in assigning staff to cover teaching assignments.

12. In Exhibit “B” to the Resolution, the Board established tie-breaking criteria to determine the relative seniority of certificated employees who first rendered paid probationary service on the same date. The District found it was unnecessary to use the tie-breaking criteria to resolve ties in seniority amongst certificated personnel. The validity of the tie-breaking process is not in dispute in this matter.

13. The reduction or elimination of the FTE positions in question will not reduce services below mandated levels.

14. The District maintains a seniority list containing employees' seniority dates, current assignments and locations, credentials and authorizations. Ms. Nichols Nolasco testified to the accuracy of the seniority list, and how it was compiled. Before the seniority list was compiled, certificated employees were notified of the District's records regarding their employment history with the District, and allowed to confirm or challenge the accuracy of that information. The seniority list was updated based on new information obtained from certificated employees that was verified. It was established that the information on the seniority list is accurate.

15. The Board's decision to reduce or discontinue those particular kinds of services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

Respondent's Challenge

16. The three certificated single subject English teachers subject to layoff, including Respondent, did not possess an EL authorization at the time the Resolution was adopted. Therefore, the District did not skip them. Respondent contends that he is subject to being skipped by virtue of skipping criterion D of Exhibit A to the Resolution.

17. Respondent's seniority date is November 6, 2000. Respondent is NCLB compliant and possesses a single subject English credential. There are several certificated single subject English teachers who are junior to him, who have been retained for the 2011-2012 school year. Those junior employees have been skipped because they are NCLB compliant and are authorized to teach English learners (EL), either by a regular credential or an emergency credential. Thus, they meet the requirements of skipping criterion D.

18. In the past, Respondent had not attempted to obtain an EL authorization because he had not been required to have one to complete his assignments with the District. For example, from 2004 to the present, Respondent was regularly assigned "gifted and talented students" (GATE) for classes, which he understood did not contain any EL students. Respondent was also assigned as an "instructional coach" during the 2008-2009 school year, where he did not have any students, but rather tutored and mentored English teachers in the District. Before this school year, Respondent had never been requested to obtain an EL authorization, or been subject to any criticism for not having it during the regular evaluation process of certificated employees. Although there was some evidence presented indicating that Respondent may have had a few EL students in prior classes, it was not established that Respondent had ever been advised of that fact by the District or anyone else.

19. On or about January 28, 2011, a letter signed by Ms. Nichols Nolasco was sent by regular mail to all employees who did not possess an appropriate EL authorization, including Respondent. The letter advised the subject employees that their employment with the District may be in jeopardy if they do not have an appropriate EL authorization. These employees were requested to present proof of an EL authorization by February 7, 2011, or alternatively, to register in an EL program.

20. It was not established that Respondent received Ms. Nichols Nolasco's letter, as Respondent credibly testified that he never received it, and the letter was mailed in such a way that receipt was not documented.² Respondent was apparently the only addressee who did not receive the letter. Ms. Nichols Nolasco testified that many employees who received the letter were able to supply proof of an EL authorization, or register in an EL program and obtain an emergency permit, by the February 7th deadline, and therefore were skipped.

21. Respondent was first made aware of a need to obtain an EL authorization at a meeting on or about March 15, 2011, when Ms. Nichols Nolasco served him with a preliminary layoff notice.

22. On or about April 13, 2011, Respondent, enrolled in the UC San Diego Extension program to obtain a regular EL credential, known as the CTCL. He expects to complete the program on or about September 30, 2011. Respondent is currently participating in coursework for the program. On or about May 3, 2011, he requested the District to file for an emergency EL permit. He has also paid the appropriate filing fees to the Commission on Teacher Credentialing. Respondent meets the requirements to obtain an emergency EL permit. Upon receipt of an emergency EL permit, which will be in effect for one year, Respondent will be fully compliant with the District policies and State Law requirements for EL authorization, i.e., he will be competent to teach EL students.

23. There are approximately 35 certificated employees in the District who only possess emergency EL permits and are not subject to layoff for the 2011-2012 school year.

LEGAL CONCLUSIONS

1. The party asserting a claim or making charges in an administrative hearing generally has the burden of proof. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155.) For example, in administrative hearings dealing with personnel matters, the burden of proof is ordinarily on the agency prosecuting the charges (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113); in personnel matters concerning the dismissal of a teacher for cause, the burden of proof is similarly on the discharging school district (*Gardner v. Commission on Prof. Competence* (1985) 164 Cal.App.3d 1035). As no other law or statute requires otherwise, the standard of proof in this case requires proof to a preponderance of the evidence. (Evid. Code, § 115.)

2. All notice and jurisdictional requirements of Education Code sections 44949 and 44955 were met. (Factual Findings 1-5.)

² For example, Education Code section 44949, subdivision (d), provides that a preliminary layoff notice is properly served when deposited in United States registered mail. Education Code section 70 allows school districts to use certified mail in lieu of registered mail.

3. The services identified in the Resolution are particular kinds of services that can be reduced or discontinued pursuant to Education Code section 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Services will not be reduced below mandated levels. Cause for the reduction or discontinuation of those particular services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949. (Factual Findings 1-15.)

4. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. (Factual Findings 1-15.)

5A. Education Code section 44955, subdivision (d)(1), provides that a school district may deviate from terminating a certificated employee in order of seniority when the district demonstrates a specific need for personnel to teach a specific course or course of study, and that the certificated employee has special training and experience necessary to teach that course of study or to provide those services, which others with more seniority do not possess. School districts are given great discretion to make decisions to effectuate layoffs, including skipping. Those decisions may be overruled, however, if proven to be arbitrary or capricious. (*Campbell Elementary Teachers Association, Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 808.) In determining whether the decision in question is reasonable or in good faith, a school district's action is measured by the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject. (*Id.*)

5B. In this case, the District's decision to not skip Respondent, under these unique circumstances, was arbitrary and capricious, and therefore cannot be sustained. Respondent did not receive the January 28th letter notifying subject employees that they would be vulnerable to layoff if they did not possess an EL authorization, or did not take the measures needed to obtain an emergency EL permit, by the deadline of February 7th. The first time Respondent was made aware of this requirement was well after the deadline, when he was given his preliminary layoff notice. The other similarly situated employees received the January 28th letter. Those interested in doing so were able to take measures to comply and be skipped. Compounding this situation is the fact that Respondent had never before been required to have an EL authorization to complete his assignments or been criticized for not having such an authorization. Several other employees, including many junior to Respondent, were skipped from layoff because, after receiving the January 28th letter, they were able to enroll in a requisite program and pay the fees needed to obtain an emergency EL permit. Respondent has taken these same steps and will receive his emergency EL permit once the District forwards the paperwork to the CTC. Not allowing Respondent the same accommodation simply because he did not receive the January 28th letter is unreasonable, and therefore an arbitrary and capricious application of skipping criteria. (Factual Findings 1-23.)

ORDER

The Accusation against Respondent Bradley Hauser is dismissed. The District shall not give him a final layoff notice for the next school year.

Dated: May 18, 2011

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings